Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2000

JOHN BARRETT and LYNNE BARRETT,

Petitioners,

vs.

MARY HARWOOD, SCOTT SMITH, JOHN DURANT, JAMES PHILLIPS, and THE VILLAGE OF MALONE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Second Circuit articulated and applied a new, unprecedented standard that a police officer must "intentionally" intimidate a debtor from asserting his lawful right to resist and object to a repossession for there to be state action. Did the Second Circuit deviate from the well-established objective standard, as articulated by all other reporting Courts of Appeal, that there is state action if it appears to a reasonable owner or reasonable creditor that a police officer is assisting in a repossession by intimidating the debtor from asserting his lawful right to resist and object to a repossession? Does the new subjective standard of the Second Circuit prevent property owners from ever having a federal action against state actors for unlawfully participating in pre-judgment attachments?

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings are named in the caption, although Defendant Mary Harwood did not appear in the district court or the court of appeals.

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Appendix A-Opinion of the United States Court of Appeals for the Second Circuit, dated August 25, 1999 ..... 1a

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Petitioners John Barrett and Lynne Barrett respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a – 13a) is reported at 189 F.3d 297. The opinion of the district court denying Petitioners' Motion for a Preliminary Injunction is published at 967 F.Supp. 744 (App. B, *infra*, 14a – 21a). The transcript of the oral opinion of the district court (App. C, *infra*, 22a – 29a) granting summary judgment is unpublished. The Order from the Court of Appeals denying the Petition for Rehearing is also unpublished (App. D, *infra*, 30a).

JURISDICTION

The Court of Appeals entered its judgment on August 25, 1999 (App. A, *infra*, 1a). The Petition for a Rehearing was denied on February 7, 2000 (App. D, *infra*, 30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . .be deprived of live, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides, at Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

N.Y. *Uniform Commercial Code* § 9-203(1), provides:

[A] security interest is not enforceable against the debtor . . . with respect to the collateral and does not attach unless(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral . . . ; and (b) value has been given; and c) the debtor has rights in the collateral.

N.Y. *Uniform Commercial Code* § 9-503 provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

STATEMENT OF THE CASE

The fundamental constitutional question in this case is whether a police officer is a state actor when it is apparent to the owner of the property or to the repossessor that the officer's undisputed presence and actions objectively assist in effecting a repossession by either a) preventing a reasonable owner of property from resisting an unlawful taking, or b) by facilitating a reasonable creditor in unlawfully take the property. To fully appreciate the significance of the conflict created by Second Circuit in constructing and applying the unprecedented (and almost insurmountable) requirement that the officer *intend* to assist in the unlawful repossession, it is essential to consider the procedural history and the uncontroverted facts.

A. Procedural History

Plaintiffs John and Lynne Barrett sued Defendants (the seller of truck; the repossession man; the police officer; and the Town of Malone) pursuant to 42 U.S.C. § 1983 for the repossession of their long haul truck without due process of law. All of the parties[1] were deposed and cross motions for summary judgment were brought in the district court. The district court found that there was no state action by the Defendants and that, if there was, the police Defendants enjoyed qualified immunity. The Second Circuit upheld this decision and found, as a matter of law, that there was no state action (without reaching the question of qualified immunity).

The Court of Appeals applied the following statement of law to the facts: "[T]he crucial question is whether the police officer was (1) present simply to stand by in case there was a breach of the peace, or (2) taking an active role that either affirmatively assisted in the repossession over the debtor's objection or *intentionally* intimidated the debtor so as to prevent him from exercising his legal right to object to the repossession." Barrett v. Harwood, 189 F.3d 297, 302-303 (emphasis added).

B. Uncontested Facts

Plaintiffs John and Lynne Barrett, long-haul truck drivers, bought a truck from Defendant Mary Harwood on or about June 23, 1995 pursuant to a written installment contract for $11,000. No security interest or ownership rights were retained or reserved by Mary Harwood.

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[1] Except Mary Harwood, who never answered or formally appeared in this action.

Defendant Mary Harwood called the repossession man, Defendant Scott Smith, to repossess the truck that she had sold to Plaintiffs. On November 8, 1996, when the Defendants repossessed Plaintiffs' truck, the Plaintiffs did not owe any money on the purchase contract.

The Decision of the Second Circuit recited the following facts: 1) Defendant Smith called the Malone Police anticipating resistance by Plaintiff John Barrett regarding his planned repossession; 2) The Malone Police Department dispatched Officer Durant to the scene in response to that call for assistance by "repo man" Smith; 3) Officer Durant stood next the truck during the repossession[2], 4) Officer Durant explained the repossession to the Plaintiffs; 5) Plaintiff John Barrett objected to Smith and Officer Durant stating that they "weren't taking the truck"; 6) Officer Durant examined Plaintiffs' documents showing that there was no default or legal cause for a repossession; 7) Officer Durant informed the Plaintiffs that it was a civil matter; 8) There were inflammatory words between the opposing private parties; 9) Plaintiff John Barrett slapped Defendant Smith; 10) Officer Durant threatened to arrest John Barrett after the slap; and 11) Plaintiff John Barrett gave the keys to Smith only after the threat of arrest.[3]

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[2] It is undisputed that Officer Durant was armed and wearing his uniform at all relevant times.

[3] Other relevant uncontested facts on the record, but omitted from the recitation by the Second Circuit, were: a) Officer Durant admitted to Lynne Barrett that he was there to prevent John Barrett from interfering with the repossession; b) Officer Durant stayed on the scene until Smith actually towed the truck away; and c) Defendant Smith admitted that he would not (and could not) have taken the truck without the presence of Officer Durant.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS CREATED A CONFLICT AMONG THE CIRCUITS IN DEVISING AND APPLYING THE UNPRECENTED LEGAL STANDARD HOLDING THAT THERE IS STATE ACTION ONLY IF AN OFFICER ATTENDING A REPOSSESSION "INTENTIONALLY" INTIMIDATES THE OWNERS FROM RESISTING THE UNLAWFUL TAKING OF THEIR PROPERTY

The legal standard for state action in repossessions and evictions in all other reporting Circuits is a) whether the police *objectively prevented* the person with rights in the property from protecting that property; b) whether it *appeared to the reasonable owner* that the officer was preventing them from protecting their property; or c) whether it *appeared to the reasonable creditor* that he could not effect the taking of the property without the presence of the officer. *Abbott v. Latshaw*, 164 F.3d 141 (3rd Cir. 1998); *Soldal v. County of Cook*, ("Soldal I"), 923 F.2d 1241, 1247 (7th Cir. 1991), *reh. en banc, Soldal v. County of Cook*, (Soldal II), 942 F.2d 1073, 1075 (7th Cir. 1991), *reversed on other ground*, 506 U.S. 56 (1992); *Jones v. Gutschenritter*, 909 F.2d 1208, 1210-13 (8th Cir. 1990); *Booker v. City of Atlanta*, 776 F.2d 272, 273 (11th Cir. 1985)(*per curiam*). *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981). The Second Circuit's new requirement of subjective intent by an officer at the scene of a repossession to actually assist or intimidate is in direct conflict with the well-established rule.

The objective standard, based upon the effect of the police action on the owner and repossessor, was first articulated in

Harris v. City of Roseburg, *supra at* 1127. The Ninth Circuit unambiguously held:

> We conclude that there may be a deprivation within the meaning of § 1983 not only when there has been an actual "taking" of property by a police officer, but also when the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor *as to cause him* to refrain from exercising his legal right to resist a repossession.

(emphasis added). The well-reasoned and exhaustive decision in *Harris v. City of Roseburg* was the source of the analysis used in the consistent line of cases that analyze state action in repossession or foreclosure cases. The clearly enunciated legal issue is the *effect* of the police officer's actions upon the owner of the property and upon the taker of that property.[4]

In 1983, the Ninth Circuit provided further contours to the definition of state action in an illegal eviction case, *Howerton v. Gabica*, *supra*. The Ninth Circuit held:

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[4] It is uncontroverted that there is no state action when a police officer is merely acquiescing to "stand by in case of trouble." *Harris*, at 1127. In *Harris*, the Ninth Circuit relied upon *United States v. Coleman*, 628 F.2d 961, 964 (6th Cir. 1980) for the definition of "merely standing by in case of trouble." In *Coleman*, the repossessor called the police to alert them that he was taking a truck. The police parked down the street and around the corner from the scene of the repossession in case there was a problem. The repossessor then was able to drive away with the truck without incident. Based on these facts, the *Coleman* court held that "mere acquiescence by the police to 'stand by in case of trouble' was insufficient to convert the repossession of the truck into state action."

> [The landlord] testified that the police presence gave [the landlord] the feeling he had the right to cut off the utilities.. . . *The actions of Officer Baldwin created an appearance that the police sanctioned the eviction.* . . .
>
> The Supreme Court in a [42 U.S.C. §] 1983 action has affirmed a judgment against a private party where state agents seized the plaintiff's property, the agents acting pursuant to statute upon the private party's *ex parte* application. *E.g., Fuentes v. Shevin*, 407 U.S. 67 (1972). . . . On the other hand, a private repossession pursuant to a state statutory provision is not state action. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). In this case, the Howertons claim the Gabicas chose a middle road, *using the police to facilitate* an illegal repossession. If true, we think this constituted state action.

Howerton, Id. at 384 (emphasis added). [5]

Booker v. City of Atlanta, supra, is next in this line of cases applying an objective standard. Regarding the unlawful repossession of a truck, in 1985 the Eleventh Circuit held:

> Here, . . . [the officer] arrived with the repossessor. Even if a jury were to find that [the officer] did not actively assist with the repossession, it nevertheless could find that [the officer's] arrival with the repossessor gave the repossession a *cachet of legality* and had the *effect* of intimidating Booker

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[5] *See* 73 ALR Fed 78 for annotations on state action by police in unlawful eviction cases.

> into not exercising his right to resist, thus facilitating the repossession. *Even if unintended*, such an effect could constitute police "intervention and aid" sufficient to establish state action. *See Menchaca*, 613 F.2d at 513; *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 923 (11th Cir.)(state action may exist where government affirmatively facilitates or encourages private action), *cert. denied*, 459 U.S. 971 (1982).

Booker, id. at 274 (emphasis added, footnote omitted). The court emphasized that the critical factor was the effect of the police action on the owner, not the *intention* of the officer.

The Eighth Circuit followed these principles in *Jones v. Gutschenritter, supra,* a landlord-tenant case, in 1990. It held:

> There was evidence that had the officer not been present [the tenant] would have taken action to protect his rights, which is similar to that in *Harris*. The district court viewed the evidence before it and stated: "There has to be some action by [Officer] Thompson which either engenders that fear or intimidation and simply being present is not enough." We believe that it was for jury to determine whether the close proximity of Officer Thompson to [the landlord] when he disconnected [the tenant's] electrical services *could have engendered fear or intimidation*, that the jury could have concluded that Officer Thompson was not simply present and standing by, but rather was lending police intervention and aid in the disconnection of [the tenant's] electrical services, and that [Officer] Thompson's action constituted state action.

Jones, id. at 1213 (emphasis added). Again, the enunciated legal standard for state action is whether the officer's presence and actions could have caused the tenant to be afraid of asserting his right to resist an illegal taking of his property.

The Seventh Circuit followed this line of cases regarding state action in an unlawful evictions in *Soldal v. County of Cook*, ("Soldal I"), *supra*. at 1247:

> [T}his is not a case of [police] inaction. Without the presence of the police, [the landlord] might have feared to order the forcible removal of the trailer from its moorings. The police prevented Soldal from exercising his statutory right to defend his property. That is state action. *Howerton v. Gabica*, [*supra]; Booker v. City of Atlanta*, [*supra]*.

The court correctly extended the *Harris* analysis to the effect of the police presence upon the private actor (*i.e.*, the landlord or the repossessor) in determining whether there is state action.

In its *en banc* rehearing in 1991, the Seventh Circuit in *Soldal v. County of Cook*, (Soldal II), *supra*, elaborated upon the standard for state action by examining the acts (not the intentions) of the sheriff:

> The eviction was unlawful, and Soldal had a common law right to resist it forcibly, although his right was limited to using mild force. The deputy sheriffs prevented Soldal from exercising his right, and while this by itself may not have made them actual participants in the eviction, the condition of the record . . . requires us . . . to assume that there was a conspiracy between the private and the public defendants . . .. If so, it is as if the deputy sheriffs

> themselves seized the trailer, disconnected the utilities, and towed it away.

Soldal (Soldal II), *Id.* at 1075 (emphasis in original). [6]

In 1998, the Third Circuit found state action in a vehicle seizure in *Abbott v. Latshaw, supra.* It held that a reasonable jury could find that a constable was a state actor during the seizure because the defendant "believed that she could not take the van from [the owner] without" his assistance. *Id.* at 147. The officer ignored the owner's protest of the seizure and threatened to arrest the owner if the owner drove the vehicle away.

In its Decision in the instant case, the Second Circuit held (emphasis added):

> [T]he crucial question is whether the police officer was . . . (2) taking an active role that either affirmatively assisted him in the repossession over the debtor's objection or *intentionally* intimidated the debtor so as to prevent him from exercising his legal right to object to the repossession.

This new subjective "intentional" standard applied in granting Summary Judgment on the issue of state action conflicts with the objective standard of the effect of the police action applied by the Third, Seventh, Eighth, Ninth, and Eleventh Circuits. Under the facts of the instant case, the use of the prevailing standard by the Second Circuit would have led to the denial of summary judgment. State action by a

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[6] The Supreme Court affirmed, without comment, the uncontested ruling that there was state action and overturned the *en banc* Seventh Circuit ruling that there was no seizure under Section 1983.

police officer is now different in the Second Circuit than in the rest of the country.

Any *one* of the facts on the record or recited by the Second Circuit in the instant case can support a finding of state action by a reasonable jury applying the prevailing objective standard of the effect of the police presence. The evidence shows that the Barretts *were* intimidated from protecting their property because of Officer Durant's actions and the repossessor, Scott Smith, *would not have* attempted and *could not have* effected the repossession without the presence of the officer. [7]

The Second Circuit's new requirement of a subjective intent by an officer to prevent or intimidate an owner from protecting their property effectively abrogates the constitutional right to due process in most common situations. Obviously an officer will testify, as did Officer Durant, that his subjective intent was to stand by in the event of trouble rather than to intimidate the owner from asserting his constitutional rights. [8]

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[7] N.Y. U.C.C. § 9-503 specifically forbids a pre-judgment attachment by repossession if will involve a breach of the peace. Officer Durant refused to stop the repossession despite the blatant and ongoing breach of the peace.

[8] How could a plaintiff ever prove that an officer subjectively *intended* to intimidate them? The Second Circuit cited no cases in support of its novel legal proposition. The Second Circuit did analogize the Barretts' situation to that in *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980)(decided prior to *Harris*), where the court found no state action during a repossession. However, the *Menchaca* court did not articulate a standard for state action. Rather, it found that the plaintiffs were not credible at trial in alleging that the police assisted in an unlawful repossession.

If the Second Circuit decision in this case is allowed to stand as a precedent, the state will be able to assist in the unlawful taking of property from individuals without any legal redress. This egregious error has the real potential of causing significant prospective confusion and harm.

This Court should grant Certiorari and uphold the rule enunciated by *Harris* and its progeny that there is state action, as a matter of law, when it appears to a reasonable person that the officer is intimidating or preventing them from asserting their constitutional right to resist an unlawful taking of their property *or* if it appears to a reasonable creditor or landlord that they can not effect the unlawful taking without the presence of the officer.

CONCLUSION

The Second Circuit has dramatically and erroneously departed from the objective standard of the other Circuits. It has established an insurmountable hurdle to determine that the state had participated in an unlawful pre-judgment attachment of private property by a creditor.

If the published decision by the Court of Appeals is allowed to stand, the right of owners of property to proceed against state actors for taking their private property without due process in the Second Circuit court will effectively be revoked. Not only is the decision wrong, but it also presents the real potential of giving rise to a misguided line of adherents in other Circuits. Wherefore, the Petition for a Writ of Certiorari should be granted.

Dated: Plattsburgh, NY
April 22, 2000

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

189 F.3D 297 (2nd Cir. 1999)

John Barrett And Lynne Barrett, Plaintiffs-Appellants, v. Mary Harwood; Scott Smith; John Durant; James Phillips And The Village Of Malone, Defendants-Appellees.

Docket No. 97-9411

August Term, 1998. Argued: September 2, 1998. Decided: August 25, 1999. Before: NEWMAN, CARDAMONE, and PARKER, Circuit Judges

CARDAMONE, Circuit Judge:

This litigation was precipitated by the repossession of plaintiffs' truck by a tow truck operator who was acting at the behest of the seller of the vehicle. Complicating the issues surrounding this event was the presence of a Village Police officer dispatched to the scene to prevent a breach of the peace; his presence raises a question of state action.

The episode giving rise to this appeal occurred on November 8, 1996, in Malone, New York, a small upstate village. The incident involved John Barrett, an over-the-road trucker, his wife, his ex-wife, a tow truck operator, and a village police officer. Plaintiffs sued the town and its officer, the seller, and the repossessor in federal district court for violating their civil rights, and plaintiffs now appeal from the grant of summary judgment in favor of the defendants and the dismissal of their complaint.

BACKGROUND

A. Repossession of Truck

Plaintiffs John and Lynne Barrett purchased the 1982 Kenworth truck in June 1995 from defendant Mary Harwood, John Barrett's ex-wife. The total purchase price was $11,000, to be paid

in monthly installments of $300 before the tenth of each month. The Barretts took immediate possession of the truck, which they used as the tractor in their business of long distance hauling by tractor trailer. Barrett obtained the original certificate of title, although it remained in Harwood's name.

A year and a half later, Harwood retained defendant Scott Smith, who operated a garage in Malone and did repossessions, to repossess the truck, because allegedly - as she told Smith - the Barretts' payments were overdue and they had forged her name on a registration form to obtain license plates from another state. The Barretts denied being in arrears or forging Harwood's signature.

Smith prepared to repossess the truck by verifying with the New York State Department of Motor Vehicles that Harwood was its title owner and, anticipating that John Barrett would resist repossession, by contacting the Village of Malone Police Department to request that a police officer be dispatched to the scene where Smith planned to repossess the vehicle. Sergeant Ritchie of the Police Department told Smith that an officer was not presently available, but that he would send one if available. Sergeant Ritchie subsequently ordered Officer Durant to the scene, informing him that a breach of peace was anticipated.

At 3:00 p.m. on November 8, while the Barretts were seated in the restaurant across the street, Officer Durant arrived at the lot where the truck was parked. The parties dispute whether the repossession was underway before Officer Durant arrived, but it is undisputed that Officer Durant did not physically assist that process. By the time John Barrett exited the restaurant and walked to the parking lot, the tow truck operator had at least begun to connect the truck to his wrecker. When Barrett asked Officer Durant what was going on, the officer advised him that Smith was repossessing his truck. Barrett objected, stating they "weren't taking the truck" and adding that his wife had proof of timely payments. He left the parking lot to get his wife, Lynne.

When they returned, Harwood had arrived; it was she who had told Smith that the truck was in the parking lot across from the

restaurant. Lynne Barrett produced for Officer Durant the purchase agreement and the signed receipts and, according to the officer's deposition, he examined the documents. The officer then informed Mrs. Barrett that the incident was a civil matter in which the police could not get involved and recommended they get a lawyer.

At this point, inflammatory words were exchanged between Barrett and Harwood, prompting Officer Durant to direct them to quiet down. Barrett then struck Smith, though the parties dispute the forcefulness of the contact. Officer Durant said that Barrett "slapped" or "backhanded" Smith and Smith testified that he received a forceful blow. John Barrett characterized the contact as merely a touch, like part of a gesture, saying he had known Smith all his life and that Smith was laughing at him. Once contact was made, Officer Durant came forward and warned Barrett: "If you start any trouble here, you'll be going in the back seat of my car. Do you understand me, mister?" Barrett asserts that he understood this statement to mean the officer would arrest him if he took any further measures to resist repossession of his truck.

The Barretts accordingly handed Smith the keys to the truck, stating in an affidavit filed later that the officer's threat of arrest was the sole reason they gave up the keys. After keeping the truck in his possession for a period of time, Smith purchased it from Harwood for $3,500, obtaining a duplicate certificate of title from her.

B. Procedural History

On January 7, 1997 the Barretts filed a 42 U.S.C. § 1983 action asserting their constitutional right to due process was violated by the unlawful repossession of their truck and seeking damages and equitable relief. Named as defendants were Harwood, the seller, Smith, the repossessor who effected the repossession, Officer Durant, and Village of Malone Police Chief Phillips. An amended complaint filed later added the Village of Malone as a defendant. The complaint also raised state law causes of action against Harwood and Smith. Officer Durant, Chief Phillips, the Village of Malone (Malone defendants) and Smith answered the amended

complaint. When Harwood failed to answer, plaintiffs moved for a default judgment against her.

The Barretts moved for a temporary restraining order and a preliminary injunction to obtain their truck from Harwood and Smith, which the district court denied. In denying the motion, the trial court determined that the Barretts had failed to establish a likelihood of success on the merits because it found no state action present. On July 25, 1997 the Malone defendants moved for summary judgment, the Barretts cross-moved for partial summary judgment, and Smith cross-moved for summary judgment. At a hearing on September 8, 1997 the district court orally granted the defendants' motions and denied the Barretts' cross-motion. It concluded that, even if state action existed, Officer Durant was protected by qualified immunity and that the Village and Chief Phillips could not be liable to plaintiffs because plaintiffs had failed to show the alleged constitutional violation had resulted from a municipal custom or policy. The court also held that because adequate post-deprivation remedies were available, the Village's policies did not violate due process.

With respect to the private parties, the district court ruled that the Barretts failed to show Smith was acting under color of state law when he repossessed the truck. It denied the motion for a default judgment against Harwood after concluding that there was no jurisdiction under § 1983 against her as a private actor. The judgment so providing was entered on October 28, 1997. It is from this judgment that the Barretts appeal. We affirm.

DISCUSSION

Pertinent to the discussion of due process that follows is the New York law on self-help repossession. On default of payment, under the New York Uniform Commercial Code, a secured party has the right to take possession of its collateral. "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." N.Y. U.C.C. Law § 9-503 (McKinney 1990). Hence, where repossession cannot be accomplished without a breach of the peace,

a retaking must be effected by legal process. *See Mauro v. General Motors Acceptance Corp.*, 164 Misc.2d 871, 875-76 (N.Y. Sup. Ct. 1995) (noting that construction of § 9-503 is strict).

The Barretts contend that Officer Durant's involvement in the repossession converted the private repossession into state action. They assert that even assuming Harwood had a right to repossess the truck under § 9-503, the right to do so without using judicial process ended when they objected to the repossession, thereby disturbing the peace. They maintain that after the breach occurred, Officer Durant had a duty to advise Smith to cease repossessing their truck and to proceed through legal action. According to appellants, Officer Durant aided in the unlawful repossession through his conduct and threat of arrest. Thus, the Barretts declare that these defendants acting under color of state law violated their constitutional right to due process.

The district court's order granting summary judgment in favor of all the defendants is reviewed de novo, keeping in mind the New York law regarding self-help repossession. That relief is appropriate only if, in resolving all ambiguities and drawing all inferences in favor of the non-movant (here plaintiffs), *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c).

I. Due Process Right

The Barretts have a constitutional right "not to have property in which [they] enjoyed a lawful possessory interest [repossessed] by state action in violation of the constitution." *Haverstick Enters., Inc. v. Financial Fed. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994). The Constitution requires notice and a prior hearing before a state can assist a secured creditor in the repossession of a debtor's property. *See Fuentes v. Shevin*, 407 U.S. 67, 80, 96-97 (1972); Sniadach v. *Family Finance Corp.*, 395 U.S. 337, 340-42 (1969). In *Fuentes v. Shevin*, the Supreme Court held that Mrs. Fuentes had a property interest in personal goods she had purchased under a conditional sales contract, even though title to the goods remained

with the vendor. 407 U.S. at 86. Her property interest was created by the substantial installment payments she made on the goods and by the terms of the conditional sales contract, which granted her continued possession and use of the goods prior to the transfer of title. *See id.*

The Barretts' property interest is analogous to that recognized in Fuentes. They too had made substantial installment payments and had proof of that fact in the form of receipts. In addition, Harwood, the seller, had agreed to their continued possession and use of the truck prior to completion of the balance of payments owed, when presumably they would then be entitled to the certificate of title in their, rather than Harwood's, name. *See Alexandre v. Cortes*, 140 F.3d 406, 410-11 (2d Cir. 1998) (finding property interest in vehicle when plaintiffs owed money on it under a purchase agreement, did not have title until satisfaction of the agreement, and were in arrears). As a consequence, the Barretts have sufficiently established a property interest in the truck so that it cannot be taken by state action without notice and an opportunity to be heard. Thus, we next examine whether there was state action present.

II. State Action

A. In General

The Fourteenth Amendment of the Constitution safeguards a citizen's right not to be deprived of property by any state without due process of law, and the Amendment is violated only "by conduct that may be fairly characterized as `state action.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). To establish a deprivation of property, a plaintiff must show that a person acting under color of any state statute, regulation, custom or usage deprived plaintiff of a right secured by the Constitution. *See* 42 U.S.C. § 1983 (1994). In *Lugar* the Supreme Court explained that in a § 1983 action brought against a state official, "the statutory requirement of action `under color of state law' and the `state action' requirement of the Fourteenth Amendment are identical." 457 U.S. at 929.

Appellants urge that Officer Durant's involvement in the repossession converted a private repossession into state action. We have not had occasion to address directly the point at which official involvement in an otherwise private repossession is sufficient to constitute state action. Although several courts have considered this question in analogous circumstances, no bright line has been drawn delineating the exact point at which an officer's presence and activities at the scene of repossession become state action in aid of the repossession.

In the relevant case law, we discern a spectrum of police involvement at the scene of a repossession. At one end of the spectrum is de minimis police involvement not amounting to state action in aid of the repossession. For example, a police officer's mere presence at the scene is insufficient to constitute state action. *See Wright v. National Bank*, 600 F. Supp. 1289, 1295 (N.D.N.Y.), aff'd, 767 F.2d 909 (2d Cir. 1985); *see also United States v. Coleman*, 628 F.2d 961, 963-64 (6th Cir. 1980) (no state action where police parked around corner from scene of repossession and were simply standing by in case of trouble).

Further along the spectrum we find involvement greater than mere presence, yet still insufficient to constitute state action in aid of the repossession. Falling into this category is the Fifth Circuit's decision in *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 510-12 (5th Cir. 1980); *see also id.* at 513-15 (Garza, J., dissenting) (giving a "more complete recital of the facts"). In *Menchaca*, the repossessors summoned police officers after the debtor, Menchaca, resisted their attempts to take his car. Upon arrival at the scene, an officer informed the debtor that "repossession was a civil matter and that the only reason the police where there was to quiet a reported disturbance." *Id.* at 510. The debtor alleged, but all the officers denied, that one officer also said she was going to arrest the debtor if he didn't give the repossessors the keys. *See id.* at 511-12. Even though such action by the officers went beyond mere presence, the Fifth Circuit ruled it did not constitute state action vis-à-vis the repossession. *See id.* at 513.

When an officer begins to take a more active hand in the repossession, and as such involvement becomes increasingly critical, a point may be reached at which police assistance at the scene of a private repossession may cause the repossession to take on the character of state action. Hence, several circuits addressing this issue, when a police officer was involved either in a repossession or in similar activities, have found state action or ruled that the issue at least survived a motion for summary judgment. *See, e.g., Soldal v. County of Cook*, 942 F.2d 1073, 1075 (7th Cir. 1991) (en banc), rev'd on other grounds, 506 U.S. 56 (1992) (state action issue survives summary judgment when police presence at trailer removal and eviction of occupants prevented plaintiff from resisting eviction); *Jones v. Gutschenritter*, 909 F.2d 1208, 1210-13 (8th Cir. 1990) (state action issue survives summary judgment where debtor saw uniformed, armed officer standing with individual disconnecting electricity and officer did not depart before disconnection complete); *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981) (state action where plaintiff yelled at repossessor to get away from his truck; officer then ordered plaintiff to stand back or get away, and told plaintiff that officer was there to stand by, and that further interference would result in arrest); *Booker v. City of Atlanta*, 776 F.2d 272, 274 (11th Cir. 1985) (state action issue survives summary judgment where police officer arrived with repossessor, giving the repossession "a cachet of legality" and intimidating debtor into not exercising his right to resist).

B. Applied to This Case

Hence, based on existing case law, the crucial question is whether the police officer was (1) present simply to stand by in case there was a breach of the peace, or (2) taking an active role that either affirmatively assisted in the repossession over the debtor's objection or intentionally intimidated the debtor so as to prevent him from exercising his legal right to object to the repossession. The Barretts maintain that the repossession did not begin until Officer Durant arrived, and that when John Barrett rushed from the restaurant to the parking lot, Smith and Officer

Durant were both present, with the officer standing next to plaintiffs' truck.

Viewing all the evidence in the light most favorable to the Barretts, as the non-movants, we are convinced, as was the district court, that Officer Durant's actions amounted to no more than the carrying out of his duty to prevent violence in the event of a breach of the peace and that there was no state action to facilitate the repossession. The situation presented here closely resembles that in Menchaca, where the Fifth Circuit also found no state action. Officer Durant was dispatched to the repossession scene for the purpose of maintaining the peace once the Barretts had exercised their legal right to object to the repossession in a non-violent manner. He informed the Barretts that the repossession was a civil matter in which he could not get involved. When John Barrett then struck Smith, Officer Durant told him, "[i]f you start any trouble here, you'll be going in the back seat of my car."

Although Barrett testified that he believed the statement to mean that if he took any additional measures to resist the repossession, he would be arrested, Officer Durant was acting well within his role as a law enforcement officer, regardless of Barrett's subjective interpretation of Durant's role. Barrett's act of aggression justified the officer's response. The officer's presence at the scene was as a peace officer and as such, a state actor. But the fact of his peacekeeping presence did not convert the private act of repossession by Smith, the tower, into state repossession action. Consequently, we agree with the district court's ruling that under the circumstances there was no state action that deprived plaintiffs of a property interest.

Our concern with our concurring colleague's position is that it focuses almost exclusively on the town's policy rather than the police officer's conduct. If we follow *Parratt v. Hudson*, 451 U.S. 527, 535-36 (1981), it would be necessary to decide first whether state action was present before examining the town's policy. In *Parratt*, of course, state action was conceded. *Id.* at 536. But here, even were a bright-line rule based on *Parratt* to preclude town liability, an officer might still be liable if the evidence showed, as

Judge Parker suggests, for example, that the officer came on the scene at the request of the repossessor and said to the debtor, "don't interfere with this repossession," or "you know you're not the rightful owner of this truck." Hence, a factual inquiry into the officer's conduct seems likely to occur in most cases, even where the town has a neutrally-worded policy.

III. Resolution

The Supreme Court has recently stated that in situations where qualified immunity may be available, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right." *Wilson v. Layne*, 119 S.Ct. 1692, 1697 (May 24, 1999) (Rehnquist, C.J., for a unanimous Court). Absent state action, Officer Durant has committed no constitutional violation. Thus, we need not reach the issue of qualified immunity.

We likewise find no possibility of liability for the Village of Malone. In order to state a § 1983 claim against a municipality, a litigant must allege that the municipality implemented and adopted a "policy statement, ordinance, regulation, or decision" or established or acquiesced in a custom that caused the unconstitutional activity. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Because there has been no unconstitutional activity, we affirm the grant of summary judgment in favor of the Village.

The district court also granted Smith's summary judgment motion after determining that state action did not exist. A private person - not a government official - acts under color of state law for purposes of § 1983 when "he has acted together with or has obtained significant aid from state officials" or because his conduct is otherwise chargeable to the state. *Lugar*, 457 U.S. at 937. Since we have already concluded that Officer Durant did not participate in the repossession to an extent sufficient to "act together with" or "aid" Smith and Harwood in the repossession, the private individuals cannot be found liable for a constitutional violation under § 1983.

Finally, we observe that whatever deprivation of rights the Barretts may have suffered when their truck was repossessed may not be vindicated in a federal civil rights suit, but may be asserted under New York tort law in state court. If the Barretts can prove that the initial seizure of the truck was wrongful, they might be able to pursue an action for damages against Smith or Harwood for tortious conversion and seek an order requiring its return if it was seized in violation of N.Y. U.C.C. § 9-503. *See, e.g., Hilliman v. Cobado*, 499 N.Y.S.2d 610 (Sup. Ct. 1986).

CONCLUSION

For the foregoing reasons, the judgment granting summary judgment in favor of all the defendants is affirmed. No costs to either party.

PARKER, Circuit Judge, concurring:

I agree with the result reached by the majority opinion but am writing separately because I disagree with the reasoning expressed in Section II. In my opinion, the analysis which denies liability as to Officer Durant springs from *Parratt v. Taylor*, 451 U.S. 527 (1981), in which an inmate sued prison officials when a hobby kit he had ordered through the mail was allegedly lost in the prison mail system. There, the Supreme Court held that, even though the inmate had been deprived of property under color of state law, 451 U.S. at 536-7, there was no liability because the deprivation had not occurred because of "some established state procedure," *id.* at 543, but instead resulted from the unauthorized failure of state agents to follow established state procedures.

Here, both the policy at issue and the actions of Officer Durant are comparable to the prison mail system at issue in Parratt; in neither case is there any indication that the state or state officials set out to deprive individuals of their property. The Village's policy, in this case, is worded neutrally and addresses only peacekeeping functions; moreover, officers are specifically instructed not to become "involved" in repossessions. While it is certainly conceivable for a municipality to have a different policy, one which

would require police to order any repossession terminated the moment a breach of the peace arises, the fact that the Village of Malone has chosen to promulgate the one it has can hardly be said to constitute "deliberate indifference" to the constitutional rights of others under the standard set forth in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Based on the evidence produced by Plaintiffs, I find that it was not "obvious" that the implementation of the Village's policy would "likely" result in a violation of Constitutional rights, id. at 390, nor were "the police, in exercising their discretion, so often violat[ing] constitutional rights that the need for further training [in this case, training on the New York Uniform Commercial Code] must have been plainly obvious to the city policymakers," *id.* at 390 n. 10.

Officer Durant's actions, in implementing the policy, do not reflect an intent to aid Smith in effecting the repossession; rather, they reflect an intent to prevent Barrett from striking Smith, and they were actions well within Durant's authority as a police officer. The situation might be different if Durant had said something like, "Don't interfere with this repossession," or "you know you're not the rightful owner of this truck," but his primary concern appears to have been for Smith's immediate physical safety. While it is undeniably the case that Officer Durant's act of restraining Barrett was intentional, the assistance he lent thereby to the repossession in progress was unintentional. Even assuming that Durant's actions were inappropriate, they reflect at most only negligence on his part in implementing the town's policy. In my opinion, section 1983 liability does not arise simply because an officer could have found a more fair or more appropriate way of handling a given situation.

Therefore, I propose the following rule with regard to police action at the scene of repossessions: so long as the primary focus of a town's policy is to deal with a breach of the peace, which an officer, of course, must do, neither he/she nor the town can be held accountable for a violation of due process simply because his or her actions as a peacekeeper may incidentally provide assistance to the repossessor. I believe that such a rule is not only mandated by *Parratt*, but would be much easier to implement than the test employed in the majority opinion, which requires the court to

engage in an exacting factual analysis of the officer's conduct in order to determine whether state action exists.

Nonetheless, because I agree with the majority that no Constitutional violation has occurred, I agree with its decision not to reach the qualified immunity issue, and I agree with its finding that there can be no liability as to the Village or as to Smith.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

967 F.Supp. 744 (N.D.N.Y. 1997)

John and Lynne BARRETT, Plaintiffs, v. Mary HARWOOD; Scott Smith; John Durant, Police Officer, Village of Malone; James Phillips, Chief of Police, Village of Malone; Village of Malone, Defendants. No. 97-CV-23. July 3, 1997.

MEMORANDUM DECISION AND ORDER

McAVOY, Chief Judge.

Plaintiffs John and Lynne Barrett ("John" and "Lynne") bring this action pursuant to 42 U.S.C. § 1983, alleging violations of their due process rights under the Fourteenth Amendment to the United States Constitution in connection with the alleged repossession of their vehicle. Plaintiffs also bring state law claims for conversion, breach of contract, and violation of the Uniform Commercial Code. Plaintiffs seek damages and injunctive relief. Plaintiffs now move for a preliminary injunction ordering defendant Scott Smith to immediately return their truck and to transfer any title that he has to them. Plaintiffs also request that this Court enter default judgment against defendant Mary Harwood.

I. BACKGROUND

John and Lynne purchased a 1982 Kenworth Truck from defendant Mary Harwood in June of 1995. (Affidavit of John and Lynne Barrett ["Barrett Aff."] ¶ 3). The total purchase price of the truck was $11,000, to be paid in minimum payments of $300 per month during the first ten days of the month. (*Id.* ¶3, 4). Plaintiffs took possession of the truck, as well as original title, in Harwood's name. (Barrett Aff. ¶ 5).

On November 8, 1996, Harwood contacted defendant Scott Smith, a towtruck operator, and asked Smith to assist with the repossession of the truck. (Smith Dep. at 21, 22). Harwood told Smith that John had forged her name on certain papers and was

behind on truck payments. (*Id.* at 22). Smith verified with the Department of Motor Vehicles that Harwood was the title owner of the truck, then contacted the Village of Malone Police, concerned that there may be violence at the scene of the repossession. (*Id.* at 24, 25). He was told by a Sergeant Ritchie that the police could not assure that a patrol would swing by, but that if one became available, it would be sent over. (Id. at 25).

Smith arrived at the scene of the repossession. Defendant John Durant arrived a few minutes later, by which time Smith had already hooked up to the truck. (Smith Dep. at 40). John then arrived at the scene and asked Officer Durant what was going on. (Durant Dep. at 14; Barrett Aff. ¶ 11). Officer Durant responded to the effect that the truck was being repossessed for nonpayment. (Durant Dep. at 14; Barrett Aff. ¶ 11). John stated that he had proof that he had made the payments on the truck; Officer Durant replied that he was "only there to keep the peace." (Smith Dep. at 41; John Barrett Dep. at 66).

John then went to get his wife. When Lynne arrived on the scene she attempted to show Officer Durant papers regarding their right to the truck. (Durant Dep. at 16; Barrett Aff. ¶12). Officer Durant responded that this was a civil matter in which he could not get involved. (Durant Dep. at 17; Smith Dep. at 28). Soon thereafter, Harwood arrived on the scene. John and Harwood then became involved in an argument, during which John struck Smith. (John Barrett Dep. at 68, 69; Durant Dep. at 18; Smith Dep. at 30). Officer Durant told John that if he struck Smith again, he would be arrested and placed in the squad car. (Lynne Barrett Dep. at 21-22, Durant Dep. at 19; Smith Dep. at 29).

Eventually, Smith asked John for the keys to the truck. (Smith Dep. at 30). John gave them to Smith voluntarily, the parties dispersed, and Smith towed the truck to his establishment. (Smith Dep. at 30, 55).

II. DISCUSSION

A. Standard for a Preliminary Injunction

In order to obtain a preliminary injunction, the plaintiffs must show (1) irreparable harm; and (2) either (a) likelihood of success on

the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping in the movant's favor. *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 811 (2d Cir.1996); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979).

B. Irreparable Harm

Courts in this Circuit have repeatedly held that " '[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.' " *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir.1991) (*quoting Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir.1983)). The party seeking the preliminary injunction must demonstrate that "it is likely to suffer irreparable harm if equitable relief is denied." *Borey*, 934 F.2d at 34 (*quoting JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir.1990)) (emphasis in original). Hence, a mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction. *Borey*, 934 F.2d at 34.

Plaintiffs point to the following in support of their argument that they will suffer irreparable harm if the injunction is not granted: (1) instead of making monthly payments of $300 to Harwood for the truck, they are now forced to lease a truck at a cost of $470 per week; (2) on information and belief, Harwood and Smith would not be able to satisfy a judgment against them; (3) plaintiffs believe that Harwood and Smith are using their truck with the likelihood of waste, damage and deterioration; and (4) the unconstitutional deprivation of their property. The second of these assertions assumes that the plaintiffs have a viable §1983 claim. That issue is dealt with in the discussion of plaintiffs' likelihood of success on the merits, *infra*.

As to the relevance of the alleged due process violation, while some constitutional deprivations amount to per se irreparable harm, *see, e.g., Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"), "the cases where courts have held that a constitutional

deprivation amounts to an irreparable harm, are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy, or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.' " *Marano v. New York City Transit Authority*, 1993 WL 17434 at *3 (E.D.N.Y.) (*quoting Public Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir.1987)). Thus, plaintiffs' allegation of a due process deprivation, without more, does not establish irreparable harm. Marano, 1993 WL 17434 at *3; *see also Church of Scientology of California v. United States*, 920 F.2d 1481, 1488 (9th Cir.1990), *cert. denied*, 500 U.S. 952, 111 S.Ct. 2258, 114 L.Ed.2d 711 (1991).

As to the remaining assertions, plaintiffs overlook the general rule that "where monetary damages may provide adequate compensation, a preliminary injunction should not issue." *Jayaraj v. Scappini, 66 F.3d 36, 39* (2d Cir.1995). Plaintiffs themselves concede that their losses are specifically quantifiable, noting that they anticipate total economic losses of over $30,000 from the loss of access to their truck. (Pl. Mem. in Support at 9). They do not assert, for example, that they have been unable to carry on their business. *Cf. New York State Trawlers Assoc. v. Jorling*, 764 F.Supp. 24, 26 (E.D.N.Y.) (noting that loss of profits severe enough to drive party out of business can constitute irreparable harm), *aff'd*, 940 F.2d 649 (2d Cir.1991). The very measurability of the bulk of plaintiff's alleged losses --i.e., the difference between the amount they must pay to lease a truck and the monthly payments they were making on the repossessed truck --compels a finding that plaintiffs have not suffered damages that cannot adequately be compensated by a monetary award. *See, e.g., Lower Manhattan Loft Tenants v. New York City Loft Board*, 1997 WL 86404, *6 (S.D.N.Y.) (no irreparable harm where plaintiffs' only loss--the difference between replacement and depreciated value--was "purely monetary and readily quantifiable"). Thus, plaintiffs have failed to establish the element of irreparable harm.

C. Plaintiffs Fail to Establish a Likelihood of Success on Their Federal Claim

Additionally, plaintiffs fail to establish that they are likely to

succeed on the merits of their § 1983 claim. Subject matter jurisdiction in this action is premised upon the existence of a federal question, *see* 28 U.S.C. § 1331, specifically plaintiffs' § 1983 claim that they were deprived of property in violation of the Fourteenth Amendment's due process guarantee. It is now axiomatic that "[a]lmost all of the constitutional protections of individual rights and liberties restrict only the actions of governmental entities." ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §14.4 (1986). The Fourteenth Amendment itself "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948); *see National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988); *Rendell,, Baker v. Kohn*, 457 U.S. 830, 837, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982). Specifically, the Fourteenth Amendment's due process guarantee "can be violated only by conduct that may be fairly characterized as 'state action.' " *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 102 S.Ct. 2744, 2747, 73 L.Ed.2d 482 (1982). Moreover, the "under color of law" requirement of § 1983 is virtually identical to the state action requirement of the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 1157 n. 7, 16 L.Ed.2d 267 (1966).

"At some point, as the police involvement becomes increasingly important, repossession by private individuals assumes the character of state action." *Mann v. Hillsborough County Sheriff's Office*, 946 F.Supp. 962, 967 (M.D.Fla.1996). In the present case, there is no allegation that any state official effectuated the repossession. Nonetheless, courts have held that state action may be found where

> the [police] officer assists in effectuating a repossession over the objection of a debtor or so intimidates him to refrain from exercising his legal right to resist a repossession. While mere acquiescence by the police to "stand by in case of trouble" is insufficient to convert a repossession into state action, police intervention and aid in the repossession does constitute state action.

Harris v. City of Roseburg, 664 F.2d 1121, 1127 (9th Cir.1981). *Roseburg* involved a police officer who was present at the repossession of a semi-tractor. *Id.* When the plaintiff came out of his house to protest the repossession, the police officer told him to "stand back or get away," and warned plaintiff that if he attempted to interfere with the repossession "any further or in any way that [plaintiff] was going straight to jail." *Id.* at 1127.

In the present case, Officer Durant made no such comment. Officer Durant did warn John Barrett that he might arrest him and put him in the squad car, but that warning was in response to John Barrett's striking of Smith. (Lynne Barrett Dep. at 21, 22; Durant Dep. at 19; Smith Dep. at 29). Durant gave no indication that he would arrest Smith for lawfully interfering with the repossession; to the contrary, the parties agree that Durant insisted he was only there to keep the peace, and could not get involved in this civil matter. (Smith Dep. at 41; John Barrett Dep. at 66; Durant Dep. at 16; Barrett Aff. ¶ 12). Thus, with the exception of his verbal intervention for the purpose of preventing physical violence (an obligation he had entirely independent of the repossession itself), Durant cannot be said to have assisted in effectuating the repossession.

Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir.), *cert. denied*, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980), like Roseburg, focused upon the presence of police officers at the scene of a repossession; the circumstances are analogous to those in the present case. In *Menchaca*, the police were called to the scene of the repossession in response to a complaint regarding loud and abusive language by plaintiff. *Id.* at 511. Upon arriving on the scene, plaintiff was warned that he would be arrested for breach of the peace if he continued using such language. *Id.* Additionally, the parties all testified that the police officers informed plaintiff that the repossession was a civil matter that did not concern the police. *Id.* The Fifth Circuit found that these circumstances failed to support sufficient intervention and aid in the repossession to constitute state action. *Id.* at 513.

Within this district, *Griffin v. Key Bank of New York*, 1996

WL 191975 (N.D.N.Y.) and *Wright v. National Bank of Stamford*, 600 F.Supp. 1289 (1985), *aff'd* 767 F.2d 909 (1985), also involved the issue of police presence at repossessions. In *Griffin*, the police officer arrived at the scene of the repossession at the request of the plaintiff's wife. *Griffin*, 1996 WL 191975 at *1. The plaintiff alleged that the police officer ordered plaintiff's wife to get out of the car, after which time the car was towed away. *Id.* In deciding whether the police officer was acting under color of law, Judge Pooler looked to whether "the police actively intervened in the possession." *Id.* at *5. Moreover, rather than concentrating on "which party called the police to the scene," Judge Pooler's analysis centered on "what the police did once they arrived." *Id.* at *5. Judge Pooler concluded that the Complaint could be construed to allege that the police officer "*departed from his peacekeeping role* and actively assisted in repossessing [the vehicle]," and thus denied defendants' Rule 12(b)(6) motion. *Id.* at *5. Conversely, in *Wright*, then„District Judge Miner found that the defendant deputy sheriffs were not acting under color of state law through their presence at the seizure of plaintiff's property. *Wright* at 1294. In *Wright*, the deputies arrived at the scene with members of the bank who were to take away the plaintiff's property. *Wright* at 1295. The bank members had requested the presence of the deputies allegedly in fear of possible violence or breach of the peace. *Wright* at 1295. Like Judge Pooler in *Griffin*, Judge Miner noted that "the appropriate inquiry must be directed to what, if anything, the deputies did once their involvement was procured." *Wright* at 1294. After conducting this inquiry, Judge Miner reached the conclusion that "there was a total lack of involvement by the deputy sheriffs. Other than their mere presence, they had absolutely no involvement in the repossession." *Id.* at 1295.

The ultimate inquiry in all of these cases is whether or not the defendant police officers were *actively involved* in the repossession. Active police intervention was defined in *Harris* as "when the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession." *Id.* at 1127. On the present facts, Officer Durant neither assisted in effectuating the repossession nor intimidated John Barrett so as to cause him to refrain from exercising his legal right to resist the repossession. At no point did Officer

Durant inform John that he did not have the right to interfere with the repossession (Durant Dep. at 15), as was the case in Roseburg. Officer Durant's verbal warning to John Barrett that he may arrest him was only in response to John's physical violence against Smith, which was entirely consistent with Durant's peacekeeping role. *See Menchaca*, 613 F.2d at 511 (no state action even where police warned plaintiff that he would be arrested if he continued using loud and abusive language); *cf. Griffin*, 1996 WL 191975 at *5 (finding state action where police officer affirmatively departed from peacekeeping role).

Nor did Officer Durant intimidate John Barrett so as to cause him to refrain from exercising his legal right to resist the repossession. Officer Durant neither suggested nor ordered that John give his keys to Smith. Although plaintiffs argue that John only gave the keys to Smith "because of the threat of arrest by Officer Durant (Barrett Aff. ¶ 15), that threat clearly related only to the possibility of a further assault on Smith. In sum, the Court finds that because no state action is present, plaintiffs have failed to establish a likelihood of success on the merits of their § 1983 claim. Thus, plaintiff's motion for a preliminary injunction is denied. Moreover, since this conclusion raises serious questions as to this Court's subject matter jurisdiction over the action, and in light of the pending summary judgment motion by defendants Durant, Phillips and the Village of Malone, the Court will reserve decision on plaintiffs' motion for default judgment against defendant Mary Harwood.

III. CONCLUSION

For all of the foregoing reasons, the Court concludes that plaintiffs have failed to establish either of the elements necessary for the award of preliminary injunctive relief. It is therefore ORDERED, that plaintiffs' motion for a preliminary injunction is DENIED. **IT IS SO ORDERED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

John and Lynne BARRETT, Plaintiffs, v. Mary HARWOOD; Scott Smith; John Durant, Police Officer, Village of Malone; James Phillips, Chief of Police, Village of Malone; Village of Malone, Defendants. No. 97-CV-23. Transcription of Decision Granting Summary Judgment, September 8, 1997.

THE COURT: Thank you. All right. Under Federal Rule Civil Procedure 56(c), if there is no genuine issue as to any material fact, the moving party is entitled to judgement as a matter of law, where the record taken as a whole could not lead a rational trier of the facts to find for the non-moving party. That's *Matsushita Electrical Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574.

The burden to demonstrate that no genuine issue of material fact exists falls solely on the moving party. *Heyman v. Commerce and Industry Insurance Company*, 524 F.2d 1317. And the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought. *Eastway Construction Company v. City of New York*, 762 F. 2d 243 at 249.

When moving party has met its burden, the non-moving party must do more than simply show that there's some metaphysical doubt as to the material facts. M*atsushita* at 585 and 586. Rather, the non-moving party must come forward with specific facts showing that there's a genuine issue for trial.

It's with these considerations in mind that the Court addresses defendant's motion for summary judgement. The defense of qualified immunity shall ordinarily be decided at the earliest possible stage of the litigation. *Castro v. United States*, 34 F. 3d 106 at 111, *quoting Hunter v. Bryant*, 112 S.Ct. 534, 536. Thus, the Court first addresses Durant's argument that he entitled to summary judgement based upon qualified immunity.

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does no violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818.

Three factors are utilized by courts in this Circuit to determine whether a right was clearly established: One, whether the right in question was defined with reasonable specificity; two, whether the decisional law of the Supreme Court and the applicable Circuit court supports the existence of the right in question; and three, whether under pre-existing law a reasonable defendant official would have understood that his or her actions were unlawful. *Jermosen v. Smith*, 945 F. 2d 547 at 550; *cert. denied*, 503 U.S. 962.

Qualified immunity also will protect a defendant even where the right was clearly establish if it was objectively reasonable for the defendant to believe the acts did not violate that right. *See Benitez v. Wolff*, 985 F. 2d 662.

Plaintiffs do not allege an unconstitutional seizure under the Fourth Amendment. The constitutional right plaintiffs ostensible claim a violation of its deprivation of property without due process of law. Asserting a violation at this general level, however, is of little value in the qualified immunity equation. rather, the right the official is alleged to have violated must have been clearly established in a more particularized and hence more relevant sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635 at 640.

First, it's not at all clear that had the state participated in the repossession, this would have amounted to a due process violation. Even an unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural requirements of the due process clause of the \Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. *Hudson v. Palmer*, 468 U.S. 517 at 533.

Here, the availability of a state tort suit, for example, an action for replevin, provided plaintiffs with the necessary due process. *Wright v. National bank of Stamford*, 600 F. Supp 1289, at 1301. that was Judge Miner's case. *Affirmed* by the Circuit, 767 F. 2d 909.

Moreover, even if the plaintiff had alleged the more clearly established right to be free from the unconstitutional seizure of property under the fourth amendment, the extent to which police officers can act to prevent a breach of the peace at the scene of a repossession without impermissibly participating in the repossession is less clear. *Griffin v. Stanek*, 1997 WL 394660 at *5. The decisional law of this Circuit is really rather lean on that question. The *Wright* decision, which was affirmed without opinion by the Second Circuit, does not delineate how far the police officer can go without assisting the repossessor. *Stanek* at *5.

The only other relevant case is this Circuit is Judge Pooler's decision in *Griffin v. Key Bank of New York*, 1996 WL 191975, which held that the plaintiffs' allegation that the police officer ordered plaintiffs' wife out of the car so that it could be towed away was sufficient to withstand the police officer's Rule 12(b) (6) motion based on lack of state action.

These cases provide little guidance to a police officer attempting to strike a balance between maintaining law and order and respecting an individual's property rights in the context of repossession. thus, there is a paucity of controlling precedent in this Circuit on the issue of the extent to which police officers may constitutionally participate in repossession. Moreover, no clear rule merges from the decisions that have addressed the question. These conclusions support a finding of qualified immunity for Officer Durant.

Plaintiffs' reliance upon the clarity of the body of state law governing the circumstances under which repossession may be effected misconceives the inquiry, since it is irrelevant whether the law regarding repossessions was clearly established. It's axiomatic that Section 1983 does not provided a remedy for official conduct that

violates only state law. *See generally Baker v. McCollan*, 443 U.S. 137; *Paul v. Davis*, 424 U.S. 693.

The question is, thus, not whether Durant violated state law, but whether Durant violated a federal statutory or constitutional right of which a reasonable person would have known. *Harlow* at 818. Whatever constitutional protection plaintiffs may have been entitled to in this instance inextricable is intertwined with the question of state action, since absent participation by the state in the repossession, there can be no constitutional violation. In other words, even if the repossession itself was unlawful under the UCC, Durant may be entitled to qualified immunity based on the lack of clear precedent establishing the circumstances under which police presence transforms an otherwise private but unlawful repossession into a constitutional violation.

Moreover, if officers of reasonable competence could disagree on the legality of Durant's actions those actions will be objectively reasonable. *Lennon v. Miller*, 66 F.3d 416 at 423, *quoting Malley v. Briggs*, 475 U.S. 335 at 341.

This Court finds that reasonable police officers could differ as to whether Durant participated in the repossession of plaintiffs' truck. *See Stanek* at*5. It is undisputed that during the repossession, Durant insisted that he was only there to keep the peace and could not get involved in what was a civil matter. smith Deposition at 41; John Barrett deposition at 66; Durant deposition at 16.

Moreover, Durant's warnings to John Barrett that he would be put in the police car after Barrett made contact with Smith could reasonably be viewed as an effort to keep the peace at the scene rather than an effort to assist in the repossession. *See Stanek* at *5.

Under these facts, it cannot be said that Durant knew or reasonable should have known that his actions or failure to act translated into participation in the private repossession to a degree tantamount to state action. *Haverstick Enterprises, In., v. Financial Credit, Inc.*, 32 F. 3d 989 at 994.

Finally, Durant was presented with conflicting claims as to ownership of the truck. He was shown the title of the truck listing Mary Harwood as owner, and the vehicle was registered in Harwood's name. On the other hand, though Lynne Barrett testified at her deposition that she showed Durant documents evidencing plaintiffs' ownership in the truck, plaintiffs have presented nothing on this motion indicating that it would be objectively unreasonable for a police officer in Durant's circumstances to believe that his actions at the scene of the repossession were unlawful. *See, for example, Malley*, 344-345. That case held reasonableness is evaluated based upon facts known to the official at the time of the acts in controversy.

For all these reasons, the Court finds that Officer Durant is entitled to qualified immunity for his actions. Thus, his motion for summary judgment is granted as to plaintiffs' Section 1983 claim.

Now, turning to the analysis of the involvement of the defendants Phillips and Malone. A municipality and its supervisory officials may be held liable in a Section 1983 action for the conduct of low level employees only if the plaintiff shows that the alleged constitutional violation resulted from a municipal custom or policy. *Ricciuti v. New York City Transit Authority*, 941 F. 2d 119 at 122; *see Monell v. Department of Social Services*, 436 U.S. 658 at 694.

The inference that such a policy existed my arise from circumstantial proof such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction. *Dwares v. City of New York*, 985 F. 2d 94 at 100; *quoting Ricciuti*, at 123.

Plaintiffs' theory of liability as to Chief Phillips is that the village had a custom and policy of sending police officers to a repossession even if there was an anticipated breach of the peace and that Chief Phillips trained and supervised Officer Durant to follow this unlawful policy. However, plaintiffs fail to provide any proof of deliberate indifference to the Barretts' constitutional rights or failure to train on Phillips' part. Moreover, plaintiffs did not explain how such a policy violated their constitutional rights. Plaintiffs provide no evidence, for example, of a Village of Malone custom or policy of

providing official assistance to private creditors in the repossession context. *See Menchaca v. Chrysler Credit Corporation*, 613 F.2d 507, 509, n. 1; *cert. denied*, 449 U.S. 953.

Because plaintiffs have failed to raise genuine issues of facts as to these matters, summary judgement is granted as to Chief Phillips and the Village of Malone plaintiffs' 1983 claim.

Now, as to defendant Smith. In its June 28, 1997, order denying plaintiffs' motion for a preliminary injunction, the Court found that plaintiffs have failed to establish that they were likely to succeed on their Section 1983 claim. The fatal flaw was the lack of state action in the repossession. the same flaw leads the Court to conclude that defendant Smith's motion for summary judgement must be granted.

To hold a private party liable under Section 1983, a plaintiff must show that the party acted under color of state law by conspiring or jointly participating with a state official to violate the plaintiffs' constitutional rights. *See Lugar v. Edmondson Oil*, 457 U.S. 922 at 941. The state involvement must be significant. *Lugar* at 932.

In determining whether police involvement in a repossession is sufficiently significant to constitute state action under Section 1983, mere police presence is insufficient. *See Wright* already cited. Rather, as the police involvement becomes increasingly important, repossession by private individuals assumes the character of state action. *Mann v. Hillsborough County Sheriff's Office*, 946 F. Supp 962 at 967. Thus, where the police depart from their peace-keeping role and actively intervene in the repossession, state action may be found. *See Griffin v. Key Bank of New York*, already cited; that's Judge Pooler's case.

It has also been held that active intervention may be found where the officer assists in effectuating a repossession over the objections of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession. *Harris v. City of Roseburg*, 664 F. 2d 1121 at 1127.

The undisputed facts in this case do not support a finding of state action. Smith called the police requesting that an officer be present because he feared that a fight may break out. He was told that if an officer was available, one would be sent. During the repossession, Durant insisted that he was only there to keep the peace and could not get involved in what was a civil matter. Smith deposition at 41, John Barrett deposition at 66, Durant deposition at 16.

The sole act of alleged intervention relied upon by plaintiffs is Durant's threat that he would arrest John Barrett. Even accepting plaintiffs' version of this incident as true, the Court concludes that such intervention does not constitute state action as a matter of law.

John Barrett admitted at his deposition that Officer Durant's threat came as a result of his striking Smith. Question from John Barretts's deposition at page 70, "And was it after you hit Smith that Officer Durant told you to keep you hands to yourself?" Answer, "Yes. He got right in front of me in my face and said, 'If you start any trouble here you will be going in the back seat of my car. Do you understand me, Mister?'" That sounds like a police officer.

Lynne Barrett corroborates that Officer Durant's warning came about because John Barrett struck Scott Smith. That's Lynne Barrett's deposition at pages 21 and 22. Thus, unlike *Roseburg*, where the police officer told plaintiff to "stand back of get away" and threatened to arrest plaintiff if he interfered with the repossession, Durant's warning was not directed as resistance to the repossession but was clearly consistent with his peace-keeping role. *See Roseburg* at 1127.

John Barrett himself testified at the deposition that nothing Durant did indicated that he was in control of the repossession. John Barrett deposition at 100. The Court reaches the same conclusion. the record in its entirety does not reasonable support an inference of the type of significant involvement by the state in the repossession contemplated by *Lugar*. Officer Durant was present only to keep the peace and neither conspired with Smith nor actively participated in the repossession. Based upon these undisputed facts, and for reasons

more fully stated in the Court's June 28, 1997, memorandum decision and order, the Court finds that no state action was present in the repossession of plaintiffs' truck. Because of this, no Section 1983 claim lies against Smith. His motion for summary judgment on the claim is, therefore granted.

This resolution necessitates that plaintiffs' cross-motion for summary judgement be denied as moot.

Court also notes that plaintiffs' motion for default judgement against defendant Mary Harwood is pending. When application is made to a Court under Rule 55(b)(2) for the entry of a judgement by default, a District Judge is required to exercise sound judicial discretion in determining whether the judgment should be entered. *Wing v. East River Chinese Restaurant*, 884 F. Supp 663 at 669. The factors to be considered in exercising this discretion include, inter alia, whether material issues of fact exist on the plaintiffs' claims. *Wing* at 669, *citing* Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d Section 2685.

Because the court has determined that no fact issues exist on plaintiffs' Section 1983 claim, upon which jurisdiction is premised, the Court denies plaintiffs' motion for default judgment against the defendant Harwood, and for the reasons above stated, dismisses plaintiffs' 1983 claim against her.

Since the 1983 claim has been dismissed in its entirety, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims. *See* 28 USC § 1367 (c)(3).

For all the foregoing reasons, defendants' motions for summary judgment are granted in their entirety and the complaint is dismissed against all defendants. Defendant is to submit an order. Thank both of you for good arguments.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of February, [T]wo [T]housand.

Present: Hon. Fred I. Parker, CJ, Hon. Jon O. Newman, CJ, Hon. Richard Cardamone, CJ

Barrett, Appellants, v. Harwood, Appellees. Docket No. 97-9411

A petition for the panel rehearing having been filed herein by John and Lynne Barrett,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk